92-1218

Supreme Court, U.S.
FILED
DEC 3 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER, 1992 TERM

Freddie D. Garrett, Plaintiff-Appellant

vs.

LOUIS W. SULLIVAN, SECRETARY
OF Health and Human Services
Defendant-Appellee

PETITION FOR WRIT OF CERTIORARI
PRO SE

TO THE SUPREME COURT OF THE
UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Freddie D. Garrett
P.O. Box 982
Bristol, Virginia 24201
(703) 669-5453

PRO Se

QUESTIONS PRESENTED

1. Why was the appellant denied a rehearing on the new evidence?

2. Why are my entitlements being denied?

THE PARTIES

The parties are the lower courts decisions and there are no other parties involved.

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TABLE OF AUTHORITIES

This does not apply due to the fact I did not use refferal to statues and cases. What is in this book was referred to by the courts.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V. U.S. CONSTITUTION

No person shall be denied his Civil Constitutional and Entitlement rights.

STATUTES INVOLVED

This does not apply, for I did not use refferal statutes and cases, since this is pro se.

OPINIONS AND ORDERS BELOW

A copy of the opinion for the 4TH CIRCUIT IN RICHMOND DENYING GARRETT'S APAPEAL BASED ON NEW EVIDENCE. ALSO INCLUDED IS THE TWO DOCTOR'S LETTERS.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 91-2273

CA-89-3-B

FREDDIE D. GARRETT

Plaintiff - Appellant

v.

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES

Defendant - Appellee

ORDER

The appellant has filed a petition for rehearing. The Court denies the petition for rehearing.

For the Court,

/s/ Bert M. Montague

Clerk

DRS. GREEN P.C.
3-A Doctors Building
BRISTOL, TENNESSEE 37620

WAVERLY GREEN, JR., M.D.
THOMAS W. GREEN, JR., M.D.
JOHN A. GREEN, M.D.
DOUGLAS W. GREEN, M.D.

November 17, 1991

RE: Freddie Garrett
SSN: 229-40-0712

To Whom It May Concern:

Upon review of the records from Dr. Fred Vance on Freddie Garrett it is clear that he had chest pain, severe hypertension and hypertensive cardiovascular disease dating back to at least January 1980. Dr. Vance's discharge diagnosis on 1-17-80 was "Hypertensive Cardiovascular Disease". I do not understand how the ruling judge can state on page 6 of his opinions dates 9-27-90 that "a heart condition was not diagnosed nor was any

treatment prescribed for his heart. This is simply incorrect.

Dr. Vance prescribed Inderal to control Mr. Garret's blood pressure and to protect his heart from the damage already shown on his EKG in January 1980. He also prescribed "Nitrostat 1/ 150q 15 min. prn chest discomfort" at his office visit on 12-9-80 after Mr. Garrett complained of an "aching in his upper chest". Dr. Vance noted again that day that the EKG was "quite abnormal with severe ischemic changes." Ischemic changes mean heart disease - period.

In summary the medical records clearly show Mr. Garrett had a serious heart condition in 1980 and the statements by Judge Williams are incorrect concerning the heart condition and the chest pain.

Respectfully submitted,
Thomas W. Green, Jr., MC
TWG:do

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October 6, 1992

RE: Freddie Garrett

SSN: 229-40-0712

To Whom It May Concern:

I would like to verify the medical findings of my brief professional contacts with Mr. Garrett from January 1980 to January 1982. I have reviewed my records and also have an unusually good memory recall of his situation because of its life-threatening implications.

He entered by care via our emergency room on January 14, 1980 on referral from Dr. Sidney Wike whom he consulted because of visual difficulty. Dr. Wike found a severe elevation of his blood pressure as well as thrombosis and blocking of the right retinal artery as well as some small hemorrhages and exudate, all indicative of severe hypertensive disease. Additional findings during his hospital stay of three days were a blood pressure of 220/124 and an EKG showing a marked abnormality consistent with left ventricular

hypertrophy off the heart at the upper limits of normal size. His discharge diagnosis was "hypertensive cardiovascular disease, probably malignant." This indicates a severe high blood pressure disease involving the heart and the blood vessels of the body.

At an office visit on December 9, 1980 he complained of anterior chest and arm pain upon lying down at night as well as with exertion over the preceding 2-3 weeks. His EKG was unchanged but clinically I felt he was having angina and added a long acting Nitroglycerine compound to try to increase the circulation in his coronary arteries. In addition, I have him Nitroglycerine tablets to use beneath his tongue whenever he had chest pain. The chest pain had lessened at the time of his next office visit on December 31, 1980.

He was worked into the office quickly on his last office visit on January 27, 1982 with another bout of chest pain that sounded muscular rather than cardiac in origin. By percussion I felt his heart had enlarged somewhat and his blood pressure was 180/100 sitting and 184/104 standing.

Unquestionably Mr. Garrett had definite evidence of cardiac and vascular disease objectively and clinically in 1980.

Sincerely,

Fred V. Vance, Jr., M.D.

FVV:JR/jf

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JURISDICTION

The decision from U. S. District Court was issued September 27, 1991. A Petition for rehearing was filled July 13, 1992 and denied August 7, 1992.

STATEMENT OF THE CASE

A copy of the U. S. District Court dismissing the appleants case is attached as Appendix A.

A copy of the U. S. Court of Appeals upholding the U. S. District Court is attached to Appendix B.

A copy of the U. S. Court of Appeals for the Fourth Circuit dening the appealant a rehearing is attached as Appendix C.

ARGUMENT

This case raises an important question as to why I have had such a hard time trying to get my entitlements, which I was forced into paying and thinking someday I'll need this if anything sould happen that I could no longer do gainful employment. Its taken over six years to get this far, due to the fact that the attorney failed to get the necessary information, that was needed. I didn't know this until he had returned all papers and I went through them and discovcered that there was information missing. So it took me sometime to obtain this information due to the fact that the Doctor had retired.

The 4th Circuit of Appeals would not take this into consideration, knowing how importatnt it meant, or if I had had this information, I'm sure Judge Williams would have not denied me my benefits. I applied for benefits December 12, 1986.

CONCLUSION

For the above reasons the Court should grant and take the new evidence and or should refer this back to the U. S. District Court and get a rehearing.

Respectfully submitted,

Freddie D. Garrett

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Bristol, VA 24203
(703) 669-5453
Pro SE

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

FREDDIE GARRETT
SSN: 229-40-0712
Plaintiff

v.

LOUIS W. SULLIVAN
Secretary of Health
and Human Services
Defendant

CIVIL ACTION NO. 89-0003-B

MEMORANDUM OPINION

BY: Glen M. Williams
Senior United States
District Judge

Plantiff has filed this action challenging the final decision of the Secretary of Health and Human Services denying plaintiff's claim for a period of disability and disability insurance benefits under the Social Security Act, as amended, 42 U.S.C. § 416 (i) and 423. Jurisdiction of this court is pursuant to § 205 (g) of the Act, 42 U.S.C. § 405 (g).

This court's review is limited to a determination as whether there is substantial evidence to support the Secretary's conclusion that plaintiff failed to meet the requirements for entitlement to benefits under the Act. If such substantial evidence exists, the final decision of the Secretary must be affirmed. Laws v. Celebreeze, 368 F. 640 (4th Cir. 1966). Stated briefly, substantial evidence has been defined as such relevant evidence, considering the record as a whole, as might be found adequate to support a conclusion by a reasonable mind. Richardson v. Perales, 402 U.S. 389, 400 (1971).

In an opinion which now stands as the final decision of the Secretary, the Social Security Administration's Appeals Council found that plaintiff was not under such a disability as to establish entitlement to benefits under the Act. While the appeals Council found that plaintiff suffered from several impairments, it concluded that the conditions were not so severe, either singly or in combination, as to constitute a disability within the meaning of the Act, 42 U.S.C. § 423, at any time prior to the termination

of insured status.

This case is before the court for the second time. Upon the Secretary's motion, the court remanded this case in an order dated August 17, 1989. Thereafter the Appeals Council remanded the case to the ALJ and directed the ALJ to credit plaintiff with additional quarters of coverage, plaintiff's insured status continued until September 30, 1984 rather than December 31, 1979. Thus there was an unadjudicated period from January 1, 1980 to September 30, 1984. After the second administrative hearing, the ALJ issued a recommended decision favorable to the Secretary. The Appeals Council, however, assumed jurisdiction, issued a decision which became the final decision of the Secretary and denied plaintiff's claim for a period of disability and disability insurance benefits.

Plaintiff was born on May 1, 1935 and completed the eighth grade. His past relevant work was in electronic sales and services. As already mentioned, plaintiff's insured status for disability insurance benefits expired on

September 30, 1984. Therefore, the issue before the court is whether plaintiff was disabled under the Act on or before this date. 20 C.F.R. § 404.130 et seq.

The medical advisor who testified at the second administrative hearing gave the following summary of plaintiff's medical condition on or before September 30, 1984:

There's, there's not much in this record prior to 1984. There is some material from Dr. Smit back in 1972 at which time he saw this man for an acute arthritic problem and suspicions of rheumatoid arthritis and there were even some x-rays suggesting rheumatoid arthritis. At that time there was an old, there was an history obtained indicating severe injuries in 1950 from which the patient has apparently well recovered, but the findings by Dr. Smit included a number of painful joints, a urinary tract infection, some obesity and the diagnosis as to the arthritis was not clear and remained unclear from this record as far as I can tell. There's nothing else then in the record until an episode in 1980 at which time the

patient had an admission to Bristol Memorial Hospital because of a referral from an ophthalmologist. He had been seen with severe visual disturbance in the right eye, of one week duration and was found to have a retinal artery thrombosis (phonetic). He was also found to have severely elevated blood pressure. This was treated by Dr. Fred Vance and improved. He was given a number off quite potent medications for his blood pressure, which apparently did control it adequately and he was discharged on good control. There is no more visual evaluation and no more evaluation of any that I can tell until 1987, after that or well, 1986, when he had a heart attack. This, so taking that comes into not prior to 1984, the patient was known to have severe hypertensive cardiovascular disease with the complication of a thrombosis of the retinal artery, which is a severe complication and presumably related to his vascular disease, but that must have partially resolved at least because there's, there's not much mention later of any problem with vision of significance. He did have at the time a history

of kidney stones and renal cysts which may have been contributory to the hypertension. If he, if he did indeed have polycycstic renal disease, that would contribute certainly, but that's not clearly further developed in this record. There is no mention that he had chest pains in 1980. In the limited records here to including two admissions, there is no mention at all that he's had any, that he had any chest pain. If he, if he had complained of angina, he did have some EKG changes that were, that are right severe, but they're, they are also probably and possibly due to what's called left ventricular hypertrophy (phonetic) rather than coronary artery insufficiency . . . .

(Record at 230-232). Because of the left ventricular hypertrophy, EKG changes and retinal thrombosis, the medical advisor opined that plaintiff had had a severe vascular disease for a long time. However, he indicated that the only end organ damage before 1984 was the LVH and retinal artery was that the visual damage must not have been very severe because Dr. Wike only noted

that "some visual defects were present." (Record at 232).

In addition to these medical problems, plaintiff was examined by Dr. James Eden, psychiatrist, on October 22, 1987. He diagnosed a Dysthymic Disorder, but other than plaintiff's own statement that he thought that his illness dated back to 1982 when he stopped working as an installer for the electronics business, Dr. Eden did not indicate that plaintiff's mental impairment existed as far back as September 30, 1984. In psychological testing, plaintiff obtained a verbal I.Q. of 77, a performance I.Q. of 82 and a full scale I.Q. of 79. The Secretary correctly accepted this borderline intellectual functioning as being life-long condition under Branham v. Heckler, 775 F.2d 1271 (4th Cir. 1985), but concluded that plaintiff did not have any other mental impairment on or before the expiration of his insured status.

After reviewing the medical evidence, the medical advisor testified that prior to September 30, 1984, plaintiff could not have performed work

requiring him to lift more than 20 pounds, to work around dangerous machinery or unprotected heights and to perform fine manipulation. Using these limitations, the vocational expert identified jobs in the economy that plaintiff could have performed on or before September 30, 1984 such as a salesclerk, cashier and product packager.

Plaintiff's condition obviously worsened when he suffered two myocardial infarctions in 1986 and underwent bypass surgery in 1987. However, the court finds substantial evidence supporting the Secretary's final decision that he was not disabled on or before September 30, 1984. Despite plaintiff's argument that the damage to his eye resulting from hypertension met the Listing of Impairments, 20 C.F.R. Part 404, Subpt. P, App. 1 § 4.00 (C), the court does not find severe damage as required. After the initial problem in 1980, there is no other evidence of any complications with his eyes or treatment for them. Plaintiff also argued that the ALJ did not properly evaluate his pain under the appropriate Fourth Circuit standards because of use of

SSR-13. Recognizing that the court in Hyatt v. Sullivan, 889 F.2d 329 (4th Cir. 1990), found this ruling defective, the Appeals Council considered plaintiff's allegations of pain under SSR 90-1p and concluded that the ALJ had properly evaluated the pain issue under the Fourth Circuit standards. The court finds substantial evidence supporting this conclusion also. As already noted, the severeness of plaintiff's current condition primarily resulted from his two heart attacks. Prior to the expiration of his insured status, he had not made any complaints of chest pain. While some abnormal results were found on an EKG and x-ray, a heart condition was not diagnosed nor was any treatment prescribed for his heart.

For these reasons the court finds substantial evidence supporting the final decision of the Secretary. Accordingly, the Secretary's final decision must be affirmed. Laws v. Celebreeze, supra. An appropriate judgement and order will be entered this day.

The Clerk is directed to send certified copies of opinion to all counsel of record.

DATED: This 27 day of September, 1991.

Glen M. Williams

Senior United States District Judge

APPENDIX B

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FREDDIE D. GARRETT,

Plaintiff-Appellant,

v. No. 91-2273

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Big Stone Gap.

Glen M. Williams, Senior District Judge

(CA-89-3-B)

Submitted: July 13, 1992

Decided: August 7, 1992

Before HALL, MURNAGHAN, and HAMILTON, Circuit Judges

Affirmed by unpublished per curiam opinion.

COUNSEL

Freddie D. Garrett, Appellant Pro Se. Jean Martel Barrett, OFFICE OF THE UNITED STATES ATTORNEY, Roanoke, Virginia; William Brian Reeser, UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES, Philadelphia, Pennsylvania, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6

OPINION

PER CURIAM:

Freddie D. Garrett appeals from an order of the district court granting summary judgement in favor of the Secretary of Health and Human Services (Secretary). The Secretary denied social security disability benefits to Garrett in administrative proceedings. Finding no new, material evidence presented on appeal and the Secretary's decision supported by substantial evidence, we affirm.[1]

[1] Because this case was decided in the normal course of appeal, Garrett's motion to expedite is hereby denied.

The Secretary, through an Appeals Council decision upholding the ruling of an administrative law judge (ALJ), decided that Garrett's disability occurred after the termination of his social security disability insurance.[2] Such decisions may be appealed to the district court for determination of whether the decision was supported by substantial evidence, with the district court's decision subject to review by this Court. 42 U.S.C.A. § 405 (g) (West 1991). On appeal, this Court does not find facts or retry the case, *King v. Califano*, 599 F.2d 597 (4th Cir. 1979), and will not upset the decision if it is supported by substantial evidence. *Wilkins v. Secretary, Health & Human Servs.*, 953 F.2d 93 (4th Cir. 1991).

I.

Garrett's first, and main, argument is that the Secretary's decision is not supported by substantial evidence. However, the ALJ, whose initial ruling provides the record evidence for

[2] The termination date of Garrett's disability insurance was determined to be September 30, 1984. This is uncontested on appeal.

appeal, heard sufficient facts to reasonably conclude that Garrett was not disabled as of September 30, 1984. The evidence produced at the hearing before the ALJ included, inter alia: (1) Expert testimony that Garrett could perform light work during the period from 1980-1984; (2) expert testimony that such work was available in Garrett's economic region during that period; (3) evidence that Garrett sought almost no medical treatment during that same period; and (4) evidence of Garrett's myocardial infarctions in 1986. Garrett's present disability is uncontested; however, the evidence could lead a reasonable trier of fact to conclude that Garrett did not become disabled until 1986, almost two years after the termination of Garrett's disability insurance. The ALJ's ruling on ineligibility, upon which the Secretary's decision to deny benefits was ultimately based, is supported by substantial evidence. The district court did not err in so finding.

II.

Garrett's second argument is that, even if

substantial evidence did exist, remand is proper under 42 U.S.C.A. § 405 (g). This section allows courts to remand to the Secretary where new, material evidence is presented on appeal. "Evidence is new...if it is not duplicative or cumulative." *Wilkins*, 953 F.2d at 96. "Evidence is material if there is a reasonable possibility that the new evidence would have changed the outcome." *Id.* During his appeal Garrett has produced: (1) a letter from his current physician criticizing the ALJ's findings; and (2) undated EKG's.

The latter evidence is unhelpful. The lack of dates or other descriptive information on the bare EKG's renders them non-material. There is no reasonable probability that the outcome would be different on remand with this evidence.

The physician's letter does not merit a remand either. Because it merely points to information already before the ALJ,[3] it is not "new." Additionally, there is no reason to believe that the Secretary would alter the outcome

[3]The ALJ noted in his written decision that Garrett had the cardiovascular condition mentioned in the letter. He took the condition into consideration, weighing it with the expert testimony and other evidence.

of the claim on remand based on the critique of the ALJ's findings by Garrett's physical. Thus, the letter is not material.

III.

Because the decision of the Secretary, based on the findings and ruling of the ALJ, is supported by substantial evidence; and because no new, material evidence has been brought forth on appeal, the district court's grant of summary judgement for the Secretary is affirmed. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 91-2273

CA-89-3-B

FREDDIE D. GARRETT

Plaintiff - Appellant

v.

LOUIS W. SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES

Defendant - Appellee

O R D E R

The appellant has filed a petition for rehearing. The Court denies the petition for rehearing.

For the Court,

/s/ Bert M. Montague

Clerk